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No. 10-828

In the Supreme Court of the United States

MICHAEL MEAD, PETITIONER

v.

CITY OF COTATI, CALIFORNIA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether petitioner has stated a claim for which relief may be granted against the municipal respondents under the Fifth and Fourteenth Amendments to the United States Constitution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is not published in the *Federal Reporter* but is reprinted in 389 Fed. Appx. 637. The opinion of the district court (Pet. App. B1-B32) is unreported, but is available at 2008 WL 4963048.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2010. A petition for rehearing was denied on August 30, 2010 (Pet. App. D1-D2). On November 22, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to December 23, 2010, and the petition was filed on December 21, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner owns contiguous vacant lots in Cotati, California, totaling 1.6 acres. Pet. App. B2. He applied to the City of Cotati's Planning Commission (Commission) for a permit to build four residential duplex units on 0.9 acres of his property. *Ibid.* The Commission approved his building permit subject to two conditions: (i) that he comply with an affordable-housing requirement that the City of Cotati's municipal code imposed on new construction projects; and (ii) that he implement, consistent with advisory guidelines promulgated by the U.S. Fish and Wildlife Service (FWS) and the California Department of Fish and Game, measures to mitigate the impact on the California tiger salamander, a species protected by the federal Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* Pet. App. B2-B4.

2. Petitioner filed this suit in the Northern District of California, challenging the conditions that the City of Cotati placed upon his building permit. Pet. App. B4. In Count I of his complaint, the only count raising a claim against a federal defendant, petitioner alleged that FWS, along with the City of Cotati, the Commission, and the California Department of Fish and Game, had taken his property without just compensation, in violation of the Fifth and Fourteenth Amendments. Petitioner contended that the two conditions that the City placed upon his building permit (of which only the salamander-mitigation condition had any connection with FWS) failed to satisfy the "essential nexus" and "rough proportionality" requirements for land-use exactions that this Court established in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 837 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374, 386-396 (1994). Pet. App. B4-B5. Petitioner sought both a declaration that the

affordable-housing and salamander-mitigation conditions effected an unlawful taking of his property and a permanent injunction to prohibit the defendants from applying those conditions to his building permit. *Id.* at B8. Petitioner did not seek, and has never sought, compensation for the alleged taking. *Ibid.*

3. The district court dismissed the complaint without prejudice to re-filing. Pet. App. B1-B32. The court concluded that petitioner's takings claim against FWS was "not ripe for review because a taking is not unconstitutional unless it is uncompensated, and he has not yet sought compensation." *Id.* at B9. "The fact that he seeks a declaratory judgment and equitable relief does not alter this analysis," said the court, "because the Court cannot declare that an unconstitutional taking has occurred—let alone order injunctive relief—until it can determine that [petitioner] was not given just compensation for the taking." *Ibid.* The district court accordingly "conclude[d] that it lack[ed] jurisdiction to adjudicate [petitioner's] takings claim against the United States" at that time. *Id.* at B14. The district court dismissed the claim against FWS "without prejudice to re-filing after [petitioner] has first sought compensation for the alleged taking." *Id.* at B31.

For similar reasons, the district court concluded that petitioner's takings claim against the state and city defendants was not ripe for adjudication in federal court because petitioner had never attempted to seek compensation through the state procedures available to him. Pet. App. B15-B21. The district court dismissed those claims without prejudice as well. *Id.* at B32.

4. The court of appeals affirmed in a short, unpublished disposition. Pet. App. A1-A5.

The court of appeals concluded that petitioner's takings claim against FWS and the California Department of Fish and Game was not ripe for review because petitioner had never sought, nor received, a final determination from those agencies on whether the tiger salamander-mitigation conditions applied to his property. Pet. App. A3-A4.

The court of appeals also rejected petitioner's challenge, made solely against the City of Cotati and the Commission, to the City's affordable-housing requirements. Pet. App. A4-A5. Assuming, without deciding, that the claim against those municipal defendants was ripe, the court nevertheless concluded that petitioner had failed to state a claim upon which relief could be granted, because he "ha[d] several options for complying with the affordable housing requirement, one of which is to pay an in-lieu fee." *Id.* at A4. The court of appeals noted that "[a] generally applicable development fee [such as the one authorized by the City's affordable-housing provision] is not an adjudicative land-use exaction subject to" the essential-nexus and rough-proportionality requirements explained in *Nollan* and *Dolan*. *Ibid.* The court of appeals stated that petitioner's challenge should have been brought under "the fact-specific inquiry developed by the Supreme Court in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978)," and that petitioner had not alleged facts that would satisfy the *Penn Central* inquiry. Pet. App. A5.

5. The court of appeals denied rehearing en banc without recorded dissent. Pet. App. D2.

DISCUSSION

The petition abandons the challenge to the tiger salamander-mitigation condition, Pet. 3-4 nn.1-2, and pursues only the challenge to the City of Cotati's affordable-housing condition. Petitioner thus has chosen not to pursue his only claim against FWS, the sole federal respondent. Accordingly, although this Court has called for the respondents to file responses to the petition for a writ of certiorari, the federal respondent takes no position regarding the petition. The only questions presented by the petition are more appropriately addressed by the municipal respondents at this stage.

CONCLUSION

The federal respondent takes no position regarding the petition.

Respectfully submitted.

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